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CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Informal consultations held pursuant to General Assembly decision 48/413

I. INTRODUCTION

1. In accordance with General Assembly decision 48/413 of 9 December 1993, informal consultations were held in the framework of the Sixth Committee on the draft articles on the jurisdictional immunities of States and their property, adopted by the International Law Commission at its forty-third session. ^{1/} At its 2nd meeting, the Sixth Committee elected Mr. Carlos Calero-Rodrigues (Brazil) as the Chairman of the informal consultations, which were held during the week of 26 to 30 September and on 3 October 1994. Pursuant to the decision the informal consultations concentrated on the identification and attenuation of the main issues of substance arising out of the draft articles with a view to facilitating the successful conclusion of a convention through general agreement.

2. The conclusions of the Chairman concerning the main issues of substance and a possible basis for achieving a compromise with respect to those issues are set forth below for consideration by the Sixth Committee in connection with the issues of substance arising out of the draft articles as well as the question of convening an international conference to conclude a convention on the subject. The Chairman's assessment is not intended to reflect the views of delegations and is without prejudice to other issues raised or proposals made during the informal consultations or the two previous sessions of the Working Group established under General Assembly decisions 46/55 of 9 December 1991 and 47/414 of 25 November 1992. ^{2/}

II. CONCLUSIONS OF THE CHAIRMAN OF THE INFORMAL CONSULTATIONS

1. Concept of a State for purposes of immunity

Article 2, paragraph 1 (b)

Issue

3. The concept of a State for purposes of immunity, as defined in paragraph 1 (b) of article 2, consists of a number of elements, including, (a) the State as a conceptual reality, (b) the organs comprising the integral structure of the State, (c) the agencies or instrumentalities which are empowered to perform acts in the exercise of the sovereign authority of the State without being a part of its integral structure, (d) political subdivisions which are also empowered to perform such acts, and (e) individuals who are authorized to act as representatives of the State. Whereas the State and its organs have the inherent right to invoke immunity subject to the limitations set forth in the articles, the other entities or individuals have this right as a consequence of the functions they perform in the exercise of the sovereign authority of the State. For historical or other reasons, the constituent units of a federal State may be accorded the same immunity as the federal State without the additional requirement of the performance of acts in the exercise of the sovereign authority of the State. While the position of constituent units varies in different federal States, providing for the possible recognition of immunity for such units would promote broader participation in a convention.

Possible basis for a compromise

4. The immunity of a constituent unit could be recognized on the basis of a declaration made by a federal State, as provided in article 28 of the European Convention on State Immunity. This approach would allow greater flexibility in the light of the differences in the national laws of federal States while at the same time facilitating the application of the provisions by national courts by reducing uncertainties with respect to constituent units of federal States.

2. Criteria for determining the commercial character of a contract or transaction

Article 2, paragraph 1 (c)

Issue

5. The nature of a contract or transaction is the primary criterion for determining whether it is of a commercial character. While some States are of the view that this is the only relevant criterion, others are of the view that a governmental purpose should also be taken into account notwithstanding the apparently commercial nature of a contract or transaction. Although paragraph 1 (c) provides the necessary flexibility to accommodate these two

views, it gives rise to a measure of uncertainty as to when the purpose criterion is to be taken into account in deciding the question of immunity.

Possible basis for a compromise

6. A greater measure of certainty could be achieved by giving States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the convention or a specific notification to the other party by whatever means in relation to a particular contract or transaction, or a combination thereof. This would clarify the situation not only for a private party who is so informed when entering into a contract or transaction with a State but also for a court which is called upon to apply the provisions of the convention.

3. Concept of a State enterprise or other State entity
in relation to commercial transactions

Article 10, paragraph 3

Issue

7. Whereas the "State" as defined in article 2 would normally include various entities, article 10, paragraph 3, recognizes, in the specific context of commercial transactions, a legal distinction between a State and certain entities in the matter of State immunity. Under article 10, paragraph 3, the immunity of a State from foreign jurisdiction is not affected by proceedings relating to a commercial transaction entered into by a State enterprise or other entity established by that State, which has a separate legal personality and is capable of bringing suit and owning property in its own name. For purposes of execution, only the property of such a State enterprise or entity, but not the property of the State, could be attached. In exceptional cases, however, it may be appropriate to disregard the separate legal personality of a State enterprise or other entity. A State enterprise may conclude a commercial contract on behalf of the Government or execute it as the authorized agent of the State. In such cases, the contract may be regarded as a transaction between the State and the private party and that State cannot invoke immunity. Nor can a State invoke immunity in cases where it acts as a guarantor of a liability of a separate entity of that State. It may also be appropriate to hold a State accountable when a State entity has deliberately misled the other party to a commercial transaction about the financial position of the entity or reduced its assets to avoid satisfying a claim.

Possible basis for a compromise

8. The scope of the provision of article 10, paragraph 3, could be clarified by indicating that the question of the liability of a State could arise in relation to a commercial transaction engaged in by a State enterprise or other

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entity established by that State where: (a) the State enterprise or other entity engages in a commercial transaction as an authorized agent of the State; (b) the State acts as a guarantor of a liability of the entity; or (c) the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim.

4. Contracts of employment

Article 11

Issue

9. Article 11 provides that a State cannot invoke immunity from jurisdiction before a competent court of another State in a proceeding which relates to a contract of employment between the State and an individual, subject to certain exceptions as described in paragraph 2. Reservations were expressed on various provisions of paragraph 2, in particular with regard to the provisions of subparagraphs (a) and (c), which might affect the overriding interest of the forum State in matters of domestic policy and law affording protection to its local labour force. As regards subparagraph (a), there was some question as to whether the phrase "closely connected to the exercise of the governmental authority" was sufficiently clear to facilitate its application by courts. With regard to subparagraph (c), it was suggested that this provision could not be reconciled with the principle of non-discrimination based on nationality.

Possible basis for a compromise

10. Further consideration could be given to the possibility of clarifying the phrase contained in subparagraph (a) and to the deletion of subparagraph (c) in the light of the principle of non-discrimination.

5. Measures of constraint against State property

Articles 18 and 19

Issues

11. In general, there are different views as to whether the exercise of jurisdiction by a court in proceedings to determine the merits of a claim against a foreign State implies the power to take measures of constraint against the property of that State with a view to satisfying a valid judgement confirming the claim. If such a power is recognized, there are also different views as to which property may be subject to measures of constraint. Any attempt to reconcile the different views on these issues would need to take into account the interests of a State in minimizing the interference with its activities resulting from coercive measures taken against its property as well as the interests of a private party in obtaining satisfaction of a claim against a foreign State that has been confirmed by an authoritative judicial pronouncement.

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Possible basis for a compromise

12. Given the complexity of this issue, it was not possible to achieve general agreement on the basis for a compromise in the limited time available. The informal consultations indicated that it may be necessary to consider several elements in attempting to find a generally acceptable compromise, with the following elements being identified for further consideration. First, it may be possible to lessen the need for measures of constraint by placing greater emphasis on voluntary compliance by a State with a valid judgement. This may be achieved by providing the State with complete discretion to determine the property to be used to satisfy the judgement as well as a reasonable period for making the necessary arrangements. Second, it may be useful to envisage international dispute settlement procedures to resolve questions relating to the interpretation or application of the convention which may obviate the need to satisfy a judgement owing to its invalidity. As a consequence of the first two elements, the power of a court to take measures of constraint would be limited to situations in which the State failed to provide satisfaction or to initiate dispute settlement procedures within a reasonable period. Since the State would be given complete discretion to determine the property to be used to satisfy a valid judgement and a reasonable period to do so, the court would have the power to take measures of constraint against any of the State's property located in the forum State which was not used for government non-commercial purposes once the grace period had expired.

13. As regards prejudgement measures, the emphasis on voluntary compliance by a State with an eventual judgement, together with the possibility of measures of constraint, would also lessen the need for such precautionary measures, which could be eliminated or possibly restricted to property belonging to State agencies, instrumentalities or other entities in proceedings instituted against them rather than the State or its organs. Thus, the requisite connection could be maintained with respect to prejudgement measures, which would only be permitted in proceedings against a State agency, instrumentality or other entity.

6. Other issues

14. The Chairman noted that Australia and Japan had drawn attention to the absence of express reservations to their respective proposals made at the previous session, which are reflected in paragraphs 86 and 91 of the report of the Working Group contained in document A/C.6/48/L.4.

Notes

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. II, sect. D.

2/ See the reports of the Working Group, A/C.6/47/L.10 and A/C.6/48/L.4 and Corr.2.
